IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

BERTHA R. WILLIAMSON — PLAINTIFF

VS. — CAUSE NO. 3:96CV160-D-D

MISSISSIPPI DEPARTMENT OF HUMAN SERVICES — DEFENDANT

MEMORANDUM OPINION

This cause comes again before the court upon the motion of the defendant, Mississippi Department of Human Services ("MDHS"), for summary judgment in its favor. The court ruled upon a previous motion for summary judgment and dismissed the individual defendants from this action. Williamson v. Phillips, Johnson, et al., Civil Action No. 3:96cv160-D-D (N.D. Miss. June 14, 1996) (Davidson, J.) (Memorandum Opinion and Order Granting Motion for Partial Summary Judgment and Dismissing Individual Defendants). The only remaining claim in this cause is the plaintiff's allegation that MDHS violated the Family and Medical Leave Act ("FMLA") when it terminated her employment. It is against this claim which the remaining defendant has now moved for summary judgment. The issue has been fully briefed by both sides and is ripe for determination.

FACTUAL BACKGROUND[1]

This court previously set out the underlying facts in this cause of action as follows:

> Bertha R. Williamson was employed with the Mississippi Department of Human Services ("MDHS") for approximately fourteen (14) years. For the last seven (7) of those fourteen (14), she worked as the Area Social Work Supervisor for Leflore, Montgomery and Carroll Counties. Trouble began brewing at work for Williamson when she returned from a major medical leave which she took from

[1]In a motion for summary judgment, the facts must be construed in the light most favorable to the non-moving party. Matagorda County v. Russel Law, 19 F.3d 215, 217 (5th Cir. 1994). The court's recitation of the facts in this case reflects this rule.

October 18, 1993, through January 17, 1994. On January 19, 1994, after Williamson returned to work, she met with defendant Billie H. Sims, a Regional Director in the Division of Family and Children Services and Williamson's immediate supervisor. Williamson Aff., at 1, Oct. 30, 1995, Exh. A att. Plaintiff's mot. In Opposition to Def.'s Mot. For Summary Judgment (hereinafter "Williamson Aff."). According to Williamson, Sims and defendant Joyce Johnson, the Director of the Division of Family and Children Services in the MDHS, were upset with Williamson over the amount of leave she had taken and caused Williamson concern over her employment retention. Id.

After the January 19th meeting, Williamson became disturbed over the lack of services being provided to an entire case load of clients. Williamson wrote a memo to Sims on March 31, 1994, requesting social worker coverage for Montgomery County through April 14, 1994. On April 5, 1994, she wrote a second memo to Sims, with a copy to Johnson, requesting more social workers for the period of April 11 through April 15, 1994, due to a temporary shortage. Sims and Williamson met the next day, April 6, and discussed the memos and possible solutions to the temporary shortage of workers. Williamson noted that Sims became angry with Williamson over what Sims perceived as Williamson's criticism and insubordination reflected in the two memos. Sims wrote a response to Johnson concerning Williamson's April 5th memo on April 6 and another response to Williamson on April 7. The solution reached by Sims required Williamson to handle social work in Leflore County and Sims to handle the work in Montgomery County for the dates of April 11-15, 1994.

During the April 6th meeting with Sims, Williamson states that she requested an annual day of leave on April 8, 1994, which request Sims verbally approved. Williamson Aff. at 3-5. On April 12, Sims and Williamson held another meeting where Sims gave her April 7th memo to Williamson, along with three notices of written reprimands. The reprimands concerned the day of leave Williamson had taken on April 8, without prior approval according to the reprimands, and other unprofessional behavior. Sims' reprimands, dated April 8, 1994, recommended Williamson's dismissal. Johnson also recommended the termination of Williamson's employment. While neither Johnson nor Sims had authority to bring about such action, their recommendations to defendant Gregg A. Phillips, Executive Director of the MDHS, resulted in the plaintiff's employment termination on June 10, 1994. Williamson filed suit against Phillips, Johnson and Sims, in their individual capacities, and the MDHS in June 1995, alleging violations of her First Amendment rights and the Family and Medical Leave Act.

Williamson v. Phillips, Johnson, et al., Civil Action No. 3:96cv160-D-D, mem. op. at 1-3 (N.D. Miss. June 14, 1996) (Davidson, J.) (internal footnote omitted). As noted previously, the court dismissed the plaintiff's First Amendment claim and the individual defendants from this action. Her

sole remaining claim falls under the auspices of the FMLA and is directed against the sole defendant, MDHS.

LEGAL DISCUSSION

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." F.R.C.P. 56(c). The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); Vera v. Tue, 73 F.3d 604, 607 (5th Cir. 1996). Once a properly supported motion for summary judgment is presented, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); Brothers v. Klevenhagen, 28 F.3d 452, 455 (5th Cir. 1994). "Where the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986); Federal Sav. & Loan Ins. v. Krajl, 968 F.2d 500, 503 (5th Cir. 1992). The facts are reviewed drawing all reasonable inferences in favor of the party opposing the motion. Banc One Capital Partners Corp. v. Kniepper, 67 F.3d 1187, 1198 (5th Cir. 1995); Matagorda County v. Russel Law, 19 F.3d 215, 217 (5th Cir. 1994).

II. *PRIMA FACIE* CASE

The defendant initially attacks the plaintiff's establishment of her *prima facie* case. In order

to prevail at trial under the FMLA, Ms. Williamson must prove that (1) the protections afforded by the FMLA extend to her, (2) she suffered an adverse employment decision, and (3) her employer treated her less favorably than a similarly-situated employee who did not request FMLA leave or her employer made the adverse employment decision because of her request for leave. Oswalt v. Sara Lee Corp., 889 F. Supp. 253, 259 (N.D. Miss. 1995). While the plaintiff must prove each element of the *p*

agen ine issue of materi al fact as to each element will preclude an award of summary judgment. Walman v. International Paper Co., 875 F.2d 468, 477 (5th Cir. 1989) (citing Thornbough v. Columbus & Greenville R.R., 760 F.2d 633, 640-41 (5th Cir. 1985)).

Depending upon the type of evidence available to her, the plaintiff may establish her *prima facie* case by three methods: direct evidence of discrimination or discriminatory intent (the "smoking gun" theory), circumstantial evidence of discrimination through the implementation of the *McDonnell Douglas* paradigm,[2] and statistical evidence demonstrating a pattern of discrimination. Kaylor v. Fannin Regional Hosp., Inc., 946 F. Supp. 988, 1000 (N.D. Ga. 1996) (citing Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307-08, 97 S. Ct. 2736, 2741-42, 53 L.Ed.2d 768 (1977)).

. *Applicability of the FMLA*

One of the findings which prompted Congress to enact the Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.*, was its belief that "there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods." 29 U.S.C. §

[2]This test, as formulated by the Supreme Court in the context of a Title VII failure-to-hire claim, requires the plaintiff to demonstrate that (1) she is a member of the protected class, (2) she was qualified for the job for which she applied, (3) the employer rejected her, and (4) the position remained open and the employer continued to seek similarly qualified applicants. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817,1824, 36 L.Ed.2d 668 (1973).

2601(a)(4). Under its provisions, an eligible employee[3] is entitled to a total of twelve (12) weeks of unpaid leave during any 12-month period due to a "serious health condition that makes the employee unable to perform the functions of the position of such employee." Id. § 2612(a)(1)(D). The Act further provides that, upon the return from any FMLA leave, an eligible employee shall be restored to the position of employment held when the leave commenced or an equivalent position. Id. § 2614(1). Finally, the Act makes it unlawful for an employer to "interfere with, restrain, or deny the exercise of or the attempt to exercise" any right provided in the FMLA. Id. § 2615(a)(1).

. Notice Requirement

The defendant initially argues that the plaintiff did not take leave under the FMLA. Instead, as the defendants contend, she simply used her accrued paid state medical leave. The MDHS issued to its employees a memorandum setting forth its policy with regard to the application of the FMLA. See Exh. 11 att. Mot. For Summary Judgment. Under the MDHS policy, an employee requesting leave pursuant to the FMLA must provide MDHS with such a request in writing and specifically use the words, "family leave request." Id. p.3. ("Leave cannot be counted as FMLA without a written request.") (emphasis in original). Furthermore, the MDHS policy states that once leave has been taken, it may not be retroactively credited as FMLA leave. Id. The defendant submits that the plaintiff failed to request FMLA leave *as required by the MDHS policy*. Additionally, the agency did not treat the plaintiff's leave as FMLA leave and considered her to still be entitled to twelve (12)

[3]An "eligible employee" is one who has been employed with the employer for at least 12 months and for a minimum of 1,250 hours of service with the same employer during the previous 12-month period. 29 U.S.C. 2611(2)(A). Generally, an "employer" is defined as any person who employs 50 or more employees in an industry affecting commerce and includes any public agency. Id. 2611(4)(A)(I), (iii). In its motion for summary judgment, the defendant does not dispute either of these two issues.

weeks of leave under the auspices of the FMLA after she returned to work on January 18, 1994. Def.'s Mem. Brief, p. 7.

The defendant's argument regarding notice is correct to some extent. The statute itself requires an employee to provide her employer with

> no less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph (29 U.S.C. § 2612(a)(1)(D)), except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

29 U.S.C. § 2612 (e)(2)(B). In its brief to the court, the defendant does not argue that the plaintiff provided inadequate or untimely notice in violation of the statute, but that the plaintiff failed to follow the guidelines set forth in the MDHS memorandum. Although the defendant's policy statement requires an employee seeking to take leave under the FMLA to *expressly* invoke the statute in a written request, the statute itself does not contain such a requirement. The Fifth Circuit addressed this very issue and concluded that "the Family and Medical Leave Act of 1993 does not require an employee to invoke the language of the statute to gain its protection when notifying her employer of her need for leave for a serious health condition." Manuel v. Westlake Polymers Corp., 66 F.3d 758, 764 (5th Cir. 1995).

In Manuel, the Fifth Circuit interpreted not only the express language of the statute itself, but also the interim regulations promulgated by the Secretary of Labor.[4] Manuel, 66 F.3d at 761-64. The court began by noting that the FMLA remains silent with regard to the *form* of notice required for foreseeable leave, and does not set forth *any* notice requirement for unforeseeable leave. Id. at

[4]29 C.F.R. §§ 825.302, 825.303; 29 U.S.C. § 2654. The final regulations issued by the Secretary became effective April 6, 1995. See 60 Fed. Reg. 2181 (Jan. 6, 1995). Because the actions relevant to this case occurred prior to that release date, the interim regulations govern this dispute. Manuel, 66 F.3d at 761 n.2.

761. The interim regulations, when discussing foreseeable leave, state that an employee must provide "at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave." 29 C.F.R. § 825.302(c). The regulation continues, however, specifying that an employee "need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed for an expected birth or adoption, for example." Id.; Manuel, 66 F.3d at 761.

The interim regulations do not contain such a notice disclaimer in their discussions regarding *unforeseeable* leave, providing only that an employee "should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case." 29 C.F.R. § 825.303(a). In interpreting the reference to "FMLA leave," the Fifth Circuit opined that such language "does not compel the conclusion that an employee seeking 'FMLA leave' must mention the statute by name." Manuel, 66 F.3d at 762. In fact, other provisions of the regulations suggest a contrary conclusion.

> As noted in section 825.302(c), an employee giving notice of the need for unpaid FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet [her] obligation to provide notice, though [she] would need to state a qualifying reason for the needed leave.

29 C.F.R. § 825.208(a)(1). After discussing the regulations and the parties' different interpretations, the Fifth Circuit ultimately concluded that neither the FMLA nor the interim regulations requires an employee to expressly mention the FMLA in order to provide proper notice to an employer of a need for FMLA leave. Manuel, 66 F.3d at 763-64. The MDHS may not limit rights granted by the FMLA by imposing restrictions outside those authorized by the statute. The plaintiff was under no statutory obligation to expressly invoke the FMLA in order to be entitled to leave under the statute and the

defendant may not, arbitrarily pursuant to an employee policy, place such a dispositive burden on her. The defendant's argument for summary judgment based on the plaintiff's failure to follow MDHS policy in the invocation of FMLA leave fails as a matter of law. Furthermore, genuine issues of material fact exist with regard to the sufficiency of the plaintiff's notice as required by the statute alone, thus precluding an award of a judgment as a matter of law.[5]

. Serious Health Condition

The defendant contends in the alternative that it should be awarded a judgment as a matter of law because the plaintiff was not entitled to take leave under the FMLA. In order for the protections afforded by the FMLA to be available to shield the plaintiff in this cause of action, she must demonstrate that she suffered from a "serious health condition" which rendered her "unable to perform the functions of [her] position . . ." 29 U.S.C. § 2612(1)(D). The interim regulations expound on what type of illness constitutes a "serious health condition" under the Act, including in the definition:

> an illness, injury, impairment, or physical or mental condition that involves:
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> (1) Any period of incapacity or treatment in connection with or consequent to inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility;
>
> (2) Any period of incapacity requiring absence from work, school, or other regular daily activities, or more than three calendar days, that also involves continuing treatment by (or under the supervision of) a health care provider; or

[5]Although the defendant's notice argument appears to hinge primarily upon the plaintiff's failure to follow MDHS policy when requesting FMLA leave, the plaintiff provided record evidence that she completed every medical leave form with which the defendant provided her and that the defendant approved the leave request without requesting additional information regarding the plaintiff's medical leave. Williamson Dep., Jan. 9, 1997, at 93-94. This record evidence demonstrates the existence of genuine issues of material fact sufficient to defeat summary judgment as to the notice issue.

> (3) Continuing treatment by (or under the supervision of) a health care provider for a chronic or long-term health condition that is incurable or so serious that, if not treated, would likely result in a period of incapacity of more than three calendar days . . . .

29 C.F.R. § 825.800.

The defendant submits that the plaintiff suffered a lumbar strain which is a temporary condition that generally heals in approximately two weeks (while the plaintiff remained on leave twelve weeks), that she took very little medication and that she received subsequent leave excuses based solely on her subjective complaints of pain. Def.'s Mem., p.9. As such, MDHS argues that Ms. Williamson did not undergo "continuing treatment" as defined under the Act. The interim regulations define "continuing treatment (by or under the supervision of a health care provider) as:

> (1) The employee . . . is treated two or more times for the injury or illness by a health care provider. Normally this would require visits to the health care provider or to a nurse or physician's assistant under direct supervision of the health care provider.
>
> (2) The employee . . . is treated for the injury or illness two or more times by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider, or is treated for the injury or illness by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider — for example, a course of medication or therapy — to resolve the health condition.

29 C.F.R. § 825.114(b)(1), (2).

While working October 14, 1993, Ms. Williamson began to experience pain and left work. She felt no better the following day and did not go in to work. Williamson Dep., Jan. 9, 1997, at 6-7. After making an appointment to be seen by a physician, Dr. D.L. Harrison, the plaintiff was hospitalized on October 18 and not discharged until October 21. Id. at 8, 11. After her release from the hospital, Ms. Williamson saw her treating doctor periodically until she returned to work on

January 18, 1994. Id. at 12.[6] Furthermore, Dr. Harrison provided the plaintiff with two leave excuses, one dated October 21, 1993 and the second one dated November 29, 1993, which did not release her to return to work until January 18, 1994. Harrison Dep., Feb. 5, 1997, at 14. He also testified that he saw the plaintiff as his patient twice after her discharge from the hospital on October 21, 1993 — once on November 4, 1993 and once November 29, 1993. Id. at 15-16. In total, the plaintiff took medical leave from October 18, 1993 until January 18, 1994. Williamson Dep., Jan. 9, 1997, at 6-7. With such evidence in the record, the court is constrained to find that genuine issues of material fact exist with respect to the gravity of the plaintiff's malady and whether she actually received "continuing treatment" for a "serious health condition." The defendant is not entitled to a judgment as a matter of law on this basis.

. *Evidence of Causation*

In further support of its motion for summary judgment, MDHS submits that there is no evidence supporting the plaintiff's allegation that she was fired because she took FMLA leave.[7] Def.'s Mem., p. 12. The court disagrees and finds that genuine issues of material fact exist as to this issue. The plaintiff testified in her deposition that her supervisor had been instructed to "kick [her]

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[6]Ms. Williamson's later testimony appears somewhat ambiguous on this point. See Williamson Dep. at 21-22. She was hospitalized on October 18, 1993, and released to return to work on January 18, 1994. Several questions merely reference "the 18th" and are not clear as to which date they concern. However, in this summary judgment setting, the court shall view the facts in the light most favorable to the plaintiff and so construe her testimony.

[7]As noted previously, a plaintiff must prove three prongs in order to establish a *prima facie* case for wrongful termination under the FMLA: (1) she is protected under the FMLA; (2) her employment was terminated; and (3) she was treated less favorably than an employee who did not request leave pursuant to the FMLA or the plaintiff's taking of FMLA leave was a motivating factor in her employer's decision to end the employment relationship. Oswalt, 889 F. Supp. at 259. The plaintiff has passed her summary judgment hurdle with respect to the first two factors and the court now turns to address the third one.

butt" when she returned from leave. Williamson Dep. at 27. She further averred that her supervisor explained this phrase to mean that she was to be fired. Id. at 27-28.

> She (Sims, the plaintiff's immediate supervisor) reminded me that Joyce (Johnson, Sims's supervisor) had already told her to kick my butt for being — that's put a little bit mild — but for being off on medical leave, of course, she said I wasn't sick, and for not helping out with the office while I was off. She reminded me of what that meant.

Id. at 67. With the testimony of these alleged admissions,[8] the court is of the opinion that genuine issues of material fact exist as to the defendant's reason for firing the plaintiff. Ms. Williamson has passed the final hurdle with respect to the establishment of her *prima facie* case.

. *Legitimate Non-discriminatory Reason*

After the plaintiff establishes her *prima facie* case, similar to any other employment discrimination cause of action, the burden shifts to the defendant to articulate a legitimate non-discriminatory reason for the plaintiff's employment termination. Oswalt, 889 F. Supp. at 259. Once the defendant employer supplies such an appropriate reason, the plaintiff must then demonstrate that the explanation is merely a pretext for discrimination. Id. (citing McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802-06, 93 S. Ct. 1817, 1824-26, 36 L.Ed.2d 668 (1973)). The defendant asserts that the plaintiff was fired because she received one group III offense and two group II offenses.[9] Def.'s Mem. pp. 15-16; Def.'s Exh. 8 (Termination Notice). Specifically, the

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[8]The temporal proximity between the plaintiff's return from leave on January 18, 1994 and her receipt of the employment termination notice on May 24, 1994 is also worrisome to the court.

[9]The Mississippi State Employee Handbook sets out three levels of offenses and the corresponding disciplinary action. Exh. 12 att. Def.'s Mem. A Group I offense is the least severe, Group II more severe and Group III the most severe. Id. at 55-58. State employees may be disciplined for Group II offenses by a written reprimand and/or suspension without pay for up to five (5) working days. Id. at 56. One Group III offense may be punished by a written reprimand, suspension without pay, demotion or dismissal. Id. at 57.

termination notice sets out

under the group III offense that the plaintiff took leave on April 8, 1994, knowing that the office would be left with no social worker coverage to handle investigations and emergencies arising on that day. Def.'s Exh. 8. The group II offenses each note as their basis the plaintiff's insubordination. Id. The plaintiff provided evidence, however, that she received permission from her supervisor to take leave on April 8, 1994 and also made arrangements for social workers from other areas to cover her area in her absence. Williamson Aff., Mar. 8, 1997. Although the query is not whether the plaintiff *actually* committed the acts contained in the termination notice, but whether the defendant had a good faith reason to *believe* she did,[10] the court finds that genuine issues of material fact exist as to whether the defendant's reasons for the plaintiff's termination were a pretext for discrimination under the FMLA. Furthermore, should the defendant have fired the plaintiff for committing the group II and III offenses, it may still be held liable if a motivating factor of its decision was also the plaintiff's taking of FMLA leave. The defendant's motion for summary judgment shall be denied.

CONCLUSION

After reviewing the parties' briefs and the record evidence, the court is of the opinion that the defendant's motion for summary judgment must be denied. The court holds as a matter of law that the defendant's employee policies may not be implemented to limit the plaintiff's rights granted by the FMLA itself. If the plaintiff complied with the statute, the fact that she may not have followed employee procedures for requesting leave does not alone provide summary judgment relief to the defendant. Genuine issues of material fact exist as to whether the FMLA protects the plaintiff in this instance and whether the defendant's articulated legitimate non-discriminatory reason for her termination is merely a pretext for discrimination. Summary judgment is thus precluded.

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[10] Waggoner v. City of Garland, 987 F.2d 1160, 1165-66 (5th Cir. 1993).

A separate order in accordance with this opinion shall issue this day.

THIS the ____ day of April 1997.

United States District Judge

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MISSISSIPPI DEPARTMENT OF HUMAN SERVICES DEFENDANT

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

Pursuant to a memorandum opinion issued this day, the court upon due consideration of the parties' briefs and the record evidence finds the defendant's motion for summary judgment not well taken and the same shall be denied.

Therefore, it is ORDERED that:

) the defendant's motion for summary judgment is hereby DENIED.

SO ORDERED this _____ day of April 1997.

United States District Judge